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No. 89-624

In the Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL., PETITIONERS

v.

PRIMARY STEEL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether, in a motor carrier's civil action against a shipper for undercharges based on a filed tariff rate, a court is required under the primary jurisdiction doctrine to refer to the Interstate Commerce Commission the question whether the carrier's assessment of the tariff rate would involve an unreasonable practice in violation of 49 U.S.C. 10701(a).

2. Whether the ICC's determination that a motor common carrier should be denied recovery of its tariff rate, because of its unreasonable practices in failing to file the negotiated rate originally charged, is compatible with the "filed rate" doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.2d 400. The opinion of the district court (Pet. App. 14a-26a) is reported at 705 F. Supp. 1401. The decision of the Interstate Commerce Commission (Pet. App. 28a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on July 17, 1989. The petition for a writ of certiorari was filed on October 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, regulates interstate transportation by motor carriers. A carrier

providing transportation subject to regulation under the Act may do so only if the carrier has an effective tariff on file with the Interstate Commerce Commission (ICC). 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a). The Act also imposes a requirement that a carrier's "rate[s]" and "practice[s]" be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices is reposed in the ICC. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987). If the ICC determines that a carrier is engaging in a practice that is or will be unreasonable, the ICC "shall prescribe the * * * practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

2. From 1981 to 1983, a division of Maislin Industries, U.S., Inc. (Maislin) operating as a motor common carrier made over 1,000 shipments of steel for Primary Steel, Inc. (Primary). Primary negotiated rates with Maislin for this transportation, with the understanding that Maislin would file the rates in tariffs with the ICC. Maislin, however, failed to file the rates in proper tariffs. The actual tariff rates applicable to the shipments were higher than those to which the parties had agreed. Pet. App. 2a. Following Maislin's bankruptcy, an audit agency appointed by the bankruptcy court discovered the difference between the rates charged Primary and Maislin's tariff rates. Maislin then commenced an action in district court to recover those undercharges. *Ibid.*

3. Relying on the primary jurisdiction doctrine, the district court referred to the ICC Primary's claim that it was an unreasonable practice for Maislin to require payment of the undercharges. Pet. App. 14a, 17a-19a. In reviewing Primary's claim, the ICC applied its policy statement in *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) [hereinafter *Negotiated Rates I*]. There, the Commission noted, it had determined that the "filed rate" doctrine did not bar the

ICC from determining, in a particular case, that a carrier had engaged in an unreasonable practice under 49 U.S.C. 10701(a) and 10704 that would preclude the carrier from later assessing the filed tariff rate. The Commission observed that the filed rate doctrine has traditionally been understood to preclude equitable defenses from defeating a carrier's right to recover undercharges in a judicial collection action. The ICC explained, however, that this should not cabin the Commission's authority under its unreasonable practice jurisdiction. The ICC recognized that *Negotiated Rates I* represented a departure from its past policy, but it justified this change by pointing to the congressional emphasis on competitive pricing in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, and the diminished need to deter rate discrimination in favor of particular shippers, given the current regulatory environment encouraging pricing flexibility. Pet. App. 33a-36a.

The ICC then proceeded to consider whether Maislin's practices were in fact unreasonable. On the basis of extensive factual findings, the ICC concluded that Maislin and Primary had negotiated particular rates, that Maislin had billed at those rates, and that Primary had a reasonable basis for relying on Maislin properly to implement those rates. Pet. App. 36a-43a. Consequently, the ICC found that "it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates." *Id.* at 44a.

On the basis of the ICC's order, the district court granted summary judgment in favor of Primary. The court rejected Maislin's arguments that the ICC had exceeded its statutory authority and that its order was barred by the filed rate doctrine. The court also determined that the ICC's order was supported by substantial evidence, and was neither arbitrary nor capricious. Pet. App. 19a-25a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court first held that the ICC had primary jurisdiction over the claim that Maislin had engaged in an unreasonable practice by

negotiating and charging one rate and then rebilling to collect a tariff rate higher than that originally charged. Relying on *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 65 (1956), the court reasoned that the considerations of agency expertise and the uniform development of policy that underlie the primary jurisdiction doctrine apply with full force here. The court explained that the reasonableness of a carrier's practices is just as much within the primary jurisdiction doctrine as the reasonableness of a carrier's rates. The court also noted that other courts had agreed that allegations of the unreasonable collection of overcharges fall within the zone of the ICC's primary jurisdiction. Pet. App. 6a (citing *Seaboard System R.R.* v. *United States*, 794 F.2d 635, 638 (11th Cir. 1986)).

The court next turned to the argument that the filed rate doctrine bars the ICC from finding that Maislin had engaged in an unreasonable practice. The court noted that the statutory source of the filed rate doctrine, 49 U.S.C. 10761(a), requires a carrier to charge the full tariff rate, and that prior decisions of this Court had strictly precluded equitable defenses based on ignorance or misquotation of the filed tariff. Pet. App. 7a (citing *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915)). The rule applied in those cases, the court observed, served the purpose of preventing discriminatory treatment of shippers. The court explained, however, that the ICC has separate statutory authority to require carriers to engage in reasonable practices. In the event that the provisions governing the collection of rates and the reasonableness of practices conflict, "the proper authority to harmonize these competing provisions is the ICC." Pet. App. 9a.[1]

Applying those considerations, the court held that the ICC's *Negotiated Rates* analysis was a reasonable accommodation of statutory policies. The court found that the ICC's policy was consistent with the requirement that a carrier charge the filed

[1] The court distinguished *Negotiated Rates I* from the holdings of *Maxwell* and *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), because, although both of those cases supported the enforcement of filed rates, neither involved "rates or practices deemed to be unreasonable by the ICC." Pet. App. 9a.

rate; the effect of the policy was to temper the consequences of that doctrine for shippers who reasonably rely on a carrier's quotation of a negotiated rate. Pet. App. 12a. The court noted that the ICC had properly explained its change in policy by referring to the relaxation of regulatory requirements under the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Pet. App. 12a. Absence of a specific legislative command, the court stated, did not impair the agency's authority to reinterpret its governing statute in light of changed conditions. The ICC had reasonably determined, the court concluded, that "in light of the regulatory changes 'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between the shippers.' " *Ibid.* (quoting *Seaboard System R.R.* v. *United States*, 794 F.2d at 638).

DISCUSSION

The court of appeals correctly upheld the ICC's *Negotiated Rates* policy as a proper exercise of the agency's discretion. We agree with petitioners, however, that the decision is in conflict with a recent decision of the Fifth Circuit over the application of the primary jurisdiction doctrine to a claim based on *Negotiated Rates*.[2] We also believe that, in view of the large number of cases raising the question presented here and the issue's importance in the interpretation of the Interstate Commerce Act, this Court's review is warranted.

1. a. The filed rate doctrine embodies the principle that neither misquotation by the carrier nor the shipper's ignorance of the tariff rate affords a defense to the carrier's action filed in court to collect the filed rate. See, *e.g.*, *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 196-197 (1913);

[2] *Caravan Refrigerated Cargo, Inc.* v. *Yaquinto*, 864 F.2d 388 (5th Cir. 1989), petition for cert. pending No. 88-1958. At the Court's invitation, we have filed a brief in that case and have provided a copy to the parties here.

Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). *Maxwell*, however, states an important qualification to the filed rate doctrine: the filed rate governs "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. That qualification reflects not only the statutory command that a carrier's rates must be reasonable, 49 U.S.C. 10701(a), but also the parallel principle that the Commission alone can determine the reasonableness of rates. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932).

Under the primary jurisdiction doctrine, "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). This rule protects the ICC's uniform development of policy, as envisioned by Congress, and ensures application of agency expertise to questions requiring thorough knowledge of industry conditions. *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 255-259 (1913). The primary jurisdiction doctrine applies equally to claims of unreasonable rates and claims of unreasonable practices. *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976).

b. The ICC's *Negotiated Rates* policy was formulated against the background of those principles. Responding to a surge in undercharge actions like the present case, a national shippers' association asked the ICC to address the problem. In *Negotiated Rates I*, the ICC announced that it would conduct an "advisory analysis," on referral from a court under the primary jurisdiction doctrine, to "determine * * * whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect." 3 I.C.C.2d at 107.

To clarify its policy and to respond to another petition from a shippers' association, the ICC issued a second statement in *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 626 (1989) [hereinafter *Negotiated Rates II*], explaining that its negotiated-rates determinations implement the statutory requirement that a carrier's practices must be reasonable and that those determinations do not rest solely on "equitable" considerations. *Id.* at 628 & n.11. The ICC also noted that negotiated-rates determinations are not "advisory opinion[s]," but result in "binding and dispositive" orders, subject to review only for arbitrariness and caprice. *Id.* at 624. Finally, to ensure evenhanded application of its policy in light of the refusal of some courts to refer such claims, the ICC announced that it would rule on negotiated-rates allegations by shippers without awaiting a court referral. *Id.* at 635-636.

2. a. The ICC's *Negotiated Rates* policy does not contravene the filed rate doctrine, as petitioners would have it (Pet. 12-13). As we explain more fully in our amicus brief (at 11-16) in *Supreme Beef Processors, Inc.* v. *Yaquinto*, No. 88-1958, this Court's many decisions holding that a *court* may not permit an equitable defense to override the carrier's right to collect the filed rate do not affect the *Commission's* power to implement the statutory requirement of reasonableness. To the contrary, that power has long been recognized as a co-equal requirement of the Act. See *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. at 97; *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922) (the tariff rate governs "[u]nless and until suspended or set aside" by the ICC). For courts to determine in individual cases whether enforcement of the filed rate is inequitable would seriously undermine the ICC's primary jurisdiction and would give rise to a lack of uniformity in application of the statute. Those considerations, however, are absent when the ICC itself determines that a carrier has committed an unreasonable practice that bars its collection of the filed rate.

Although the ICC's current application of its unreasonable practice powers represents a change from prior practice, the Commission is free to revise its interpretation of the statutory

provisions it administers to respond to changed conditions. *American Trucking Ass'n* v. *Atchison T.&S.F. Ry.*, 387 U.S. 397, 416 (1967). That principle has particular force here in light of Congress's substantial amendment of the transportation policy of the United States in the Motor Carrier Act of 1980. See U.S. Amicus Br. at 12, *Supreme Beef Processors, Inc.* v. *Yaquinto*, No. 88-1958. The 1980 Act directs the ICC to apply a new policy of "promot[ing] competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public."[3] The implementation of that goal warrants the ICC's reconsideration of the policy of requiring a shipper to bear the full consequences of a carrier's failure properly to file negotiated rates.

Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), does not require a different result. There, the Court held that the policies expressed in the 1980 Act were not sufficient to justify overruling this Court's decision in *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), which had precluded antitrust treble damages actions based on tariff rates filed under an ICC-approved agreement. *Square D* relied heavily on stare decisis (476 U.S. at 424), but that principle does not constrain the *Commission's* power to reinterpret its governing statute in light of changed conditions. Indeed, the Commission would be remiss if it failed to revisit its past policies to take account of Congress' articulation in 1980 of a new pro-competition policy in regulating motor carriers.

Contrary to petitioners' view (Pet. 19 n.6), the ICC's *Negotiated Rates* policy does not free carriers from filing their rates in proper tariffs with the ICC (49 U.S.C. 10762(a)(1)), nor does it announce a universal rule that a negotiated rate prevails over a filed rate (49 U.S.C. 10761(a)).[4] Compare *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). Rather, the policy formulates a remedy, under the ICC's authority to police unreasonable practices, when a carrier has negotiated and charged one rate, has failed to file that rate in a tariff with the ICC, and then seeks to recover from the shipper the higher, filed rate. This is entirely lawful and appropriate. The ICC's authority to administer the Act makes it the proper body to reconcile the congressional commands to foster competition while preventing discrimination between shippers. See *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 352, (1982) ("The remedies for a carrier's violation of the regulations are best left to the ICC for such resolution as it thinks proper."); *Seaboard System R.R.* v *United States*, 794 F.2d 635, 638 (11th Cir. 1986). See also *INF, Ltd.* v. *Spectro Alloys Corps.*, 881 F.2d 546 (8th Cir. 1989).

b. Relying principally on *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), petitioners contend (Pet. 13-21) that the ICC's *Negotiated Rates* policy improperly provides a remedy for past unreasonable practices when Congress intended none to exist under the statutory scheme. The argument proceeds as follows: petitioners first note that the Motor Carrier Act of 1935, 49 U.S.C. 502 *et seq.* (1935 Act) did not provide a reparations remedy for a shipper to recover for past unreasonable practices or rates. Petitioners next state that *T.I.M.E.* construed the remedial scheme of the 1935 Act to preclude a court from referring to the ICC the shipper's defense to an undercharge action that the tariff rate is unreasonable. Petitioners continue that although Congress in 1965 overruled *T.I.M.E.* and provided a reparations remedy for past unreasonable *rates*, Congress provided no parallel remedy for past unreasonable *practices*. Thus,

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[3] Motor Carrier Act of 1980, Pub. L. No. 96-296, § 4, 94 Stat. 794 (codified at 49 U.S.C. 10101(a)(2)).

[4] Nor does the ICC's policy transgress other provisions that support the filed rate requirement. See Pet. 20. The Act creates civil liability for a shipper's knowing receipt of a rebate (49 U.S.C. 11902) and criminal liability for the knowing provision or receipt of transportation at below-tariff rates (49 U.S.C. 11903). A shipper that violates those provisions by *knowingly* paying an unfiled rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy (because reliance on the applicability of the negotiated rate must be reasonable). A carrier that violates those provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it ignored its duty to make a timely filing.

petitioners conclude, to refer an unreasonable practice claim to the ICC in the midst of an undercharge case would "permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly." *T.I.M.E.*, 359 U.S. at 475.

Petitioners' argument misreads the implications of *T.I.M.E.* and ignores this Court's subsequent narrowing of that decision. Even before Congress expressly overruled *T.I.M.E.*,[5] this Court had substantially confined its scope in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962). There, the Court permitted a shipper to file suit against a carrier for unreasonable routing practices that caused the shipper to make excess payments, and to obtain referral of that claim to the ICC. The Court held that the reasonableness of a carrier's routing practices falls within the ICC's primary jurisdiction, and that the absence of reparations authority did not prevent the ICC from determining the issue on referral from a court. "Indeed, the doctrine of primary jurisdiction is designed to apply 'where a claim is originally cognizable in the courts, and . . . enforcement of the claim requires the resolution of issues . . . placed within the special competence of an administrative body.' " 371 U.S. at 88-89 (quoting *United States* v. *Western Pacific R.R.*, 352 U.S. at 64).

Hewitt-Robins thus makes clear that the availability of a remedy for an unreasonable practice "depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." 371 U.S. at 89. Here, the ICC has determined that, in limited circumstances, a carrier's action to collect the filed rate may be incompatible with the reasonable-practice provision of the statute. The determination of that issue when raised in a carrier's collection action may properly be referred to the ICC, regardless of any doubt about the shipper's independent right to reparations for such practices. If Congress had intended in the 1965 amendments to foreclose an existing remedy for past unreasonable practices, it would have made that intention explicit. The legislative history discloses precisely the opposite intent.[6]

[5] Congress overruled *T.I.M.E.* in the Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 (codified at 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987), 49 U.S.C. 11706(c)(2)). See H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965). Courts and the ICC have interpreted this legislation to require a shipper to seek reparations in court, whereupon the court refers to the Commission the issue of reasonableness. See *United States* v. *Associated Transp., Inc.*, 505 F.2d 366, 368-369 (D.C. Cir. 1974); *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403 (1969).

In any event, petitioners' assumption that a reparations remedy is not available for the past unreasonable practice at issue in this case is at best debatable. To be sure, the statute expressly authorizes reparations against motor carriers only for damages "resulting from the imposition of rates" that violate the statute and does not by its terms mention reparations for unlawful "practices." 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987).[7] But the authority to award reparations "resulting from the imposition of rates" appears broad enough to encompass a claim based on a carrier's demand for a tariff rate that exceeds the negotiated rate.[8] Any narrower reading of the provision would be entirely artificial, since the shipper's core complaint in a *Negotiated Rates* case is simply that imposing a tariff rate is unreasonable. While the ICC has described a *Negotiated Rates* claim as an unreasonable practice, a parallel analysis could be applied to declare that a negotiated, but unfiled rate is in certain

[6] The legislative history confirms Congress's intent to "permit a court * * * to award reparations to persons injured *through violations of the Interstate Commerce Act.*" The provision was designed to "restore" the procedures used by the ICC before *T.I.M.E.*, but "not [to] affect in any way the right of shippers to recover damages from misrouting under the Hewitt-Robins doctrine." H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965) (emphasis added).

[7] By contrast, the statute is more explicit regarding the availability for reparations against rail or water carriers for unreasonable practices. See 49 U.S.C. 11705(b)(2) (authorizing reparations against rail or water carriers for "an act or omission * * * in violation of this [Act]").

[8] The language of the original provision overruling *T.I.M.E.* is similarly broad. See Act of Sept. 6, 1965, Pub. L. No. 89-170, § 6, 79 Stat. 651 (defining "reparations" to mean "damages resulting from charges for transportation services to the extent that the Commission * * * finds them to have been unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.").

circumstances the maximum reasonable rate. See *Iowa Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796, 807-809 (8th Cir. 1981) (upholding an ICC order prescribing, as a maximum reasonable rate, the rate negotiated between the parties rather than the tariff rate filed by the carrier). In that setting, reparations would clearly be allowed. Given that reparations could be awarded to shippers if their claim was described in terms of unreasonable rates rather than unreasonable practices, it can hardly be maintained that the referral to the ICC of a *Negotiated Rates* claim would undermine the statutory scheme.

3. The validity of the ICC's *Negotiated Rates* policy is an issue meriting review by this Court. The court of appeals' decision conflicts with a decision of the Fifth Circuit regarding the application of the primary jurisdiction doctrine to a claim based on *Negotiated Rates*. In *Caravan Refrigerated Cargo, Inc.* v. *Yaquinto*, 864 F.2d 388 (1989), petition for cert. pending, No. 88-1958, the court, in a holding that directly conflicts with the decision below, denied referral to the ICC of a *Negotiated Rates* claim. Moreover, nearly every other circuit has a pending case regarding the application of *Negotiated Rates*. See Pet. App. 45a-47a.[9] The issue has also provoked inconsistent decisions from the district courts. Compare *id.* at 49a (granting referral) with *id.* at 50a-51a (denying referral). The ICC informs us that it has received 117 *Negotiated Rates* cases on referral from courts, and 80 cases filed directly with the agency. In view of the

[9] See *Transtop, Inc.* v. *Delta Traffic Serv.*, No. 89-1662 (1st Cir. argued Nov. 7, 1989) (referral denied); *Delta Traffic Serv.* v. *Appco Paper & Plastics Corp.*, No. 89-9057 (2d Cir. argued Aug. 17, 1989) (referral denied); *Branch Motor Express* v. *Caloric Corp.*, No. 89-1330 (3d Cir. argued June 27, 1989) (referral granted); *Cooper* v. *Delaware Valley Shippers Ass'n*, No. 89-3259 (4th Cir. argued Dec. 7, 1989) (referral granted in some cases and denied in other); *Orr* v. *Sewell Plastics, Inc.*, No. 89-5108 (6th Cir. argued Nov. 13, 1989) (referral granted); *Orscheln Bros. Truck Lines* v. *Zenith Elec. Corp.*, No. 89-1329 (7th Cir. docketed Feb. 17, 1989) (referral denied); *West Coast Truck Lines* v. *Weyerhaeuser Co.*, No. 89-35115 (9th Cir. argued Oct. 3, 1989) (referral granted); and *Feldspar Trucking Co.* v. *Greater Atlanta Shippers Ass'n*, No. 89-8450 (11th Cir. docketed June 9, 1989) (referral denied).

frequency with which this issue is arising and the failure of the lower courts to agree, there is a need for clarification by this Court.

In our brief in *Supreme Beef Processors, Inc.* v. *Yaquinto*, No. 88-1958, filed at the Court's invitation, we noted that the Fifth Circuit's decision may furnish a less suitable vehicle for review because the record does not include the Commission's views on whether an unreasonable practice was in fact committed. U.S. Amicus Br. at 17. The instant petition, in contrast, affords a well-developed record and an expression of the ICC's views in a particular context. Consequently, in our view, the Court should grant review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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